COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: PETITION OF BAY STATE GAS COMPANY
FOR APPROVAL OF REVISED TARIFFS **DTE 05-27**

LOCAL 273 MOTION TO ALLOW REPLY AND REPLY TO COMPANY'S OPPOSITION TO MOTION TO PRESERVE STATUS QUO

I. MOTION TO ALLOW REPLY

On June 13, 2005, Local 273 of the Utility Workers Union of America "(Local 273") filed a "Motion to Preserve Status Quo and Preserve Department's Jurisdiction Pending Final Decision" ("Motion"). On June 20, 2005, Bay State Gas Company ("Bay State" or "Company") filed an Opposition to that Motion. Local 273 asks leave to file a reply to correct a grievous factual misrepresentation by the Company, and to correct serious misrepresentations of Local 273's motion and the relevant law contained in the Company's opposition.

II. REPLY

A. The Company Has Grievously Misrepresented Known Facts

In its Opposition, the Company variously states that "an agreement with IBM has not been reached" (at 3); that the "outsourcing initiative is by no means final at this point" (at 10); and that "the reductions are in fact not imminent" (at 10). As of the date of filing its June 13 motion, Local 273 had already submitted fairly conclusive evidence that NiSource had chosen IBM as its outsourcing vendor and that layoffs of key billing and customer service personnel were both inevitable and reasonably imminent.

It is a grievous misrepresentation of known facts for the Company to have filed an

opposition late in the day on June 20 that states that "an agreement with IBM has not been reached." Local 273 appends to this Opposition a letter from Bob Skaggs (Attachment 1), NiSource's President, in which he unequivocally states:

> Late yesterday [June 20], we signed a definitive agreement with IBM to provide business support functions at NiSource.

Further, directly rebutting the Company's statements that the "outsourcing initiative is by no means final at this point," and that "the reductions are in fact not imminent" (Opposition, at 10) Mr. Skaggs goes on to state:

> *Starting July 1, 2005*, IBM will operate a broad range of business functions for NiSource . . . . Some employees will be retained as NiSource employees; some will be offered a new position at IBM; *and some will be scheduled for release with a severance package.* The goal is for each individual to know his or her personal circumstances *by mid-afternoon [of June 21]*. (Italics and bracketed words added).

The Company tortures the English language, and could unfortunately deceive the Department, by arguing that an agreement with IBM has not been reached or that "reductions are in fact not imminent."[1] The Company (either Bay State or NiSource) has already met with

[1] The Bob Skaggs letter that Local 273 has appended to this Reply is dated June 21, 2005, 8:45 AM. It would strain credulity to suggest that the Company did not know when it filed its Opposition late in the day on June 20 that a contract was that same day being signed with IBM and that staff reductions were "imminent." A NiSource press release announcing outsourcing of up to "572 employees" to IBM and elimination of "445 positions" appeared as early as 8:41 AM on the PRNewswire. "NiSource and IBM Sign Agreement to Transform Key Business Process and Technology Functions," biz.yahoo.com/prnew/0506212/detu009.html?.v=13. However, counsel for Local 273 contacted counsel for the Company at 1:30 PM on June 21, 2005 to discuss the Company's knowledge as of the time the June 20 filing was made. Company counsel represented that they did not know on June 20 that the contract with IBM was being signed the same day, and counsel offered to promptly make a filing to correct any statements to the contrary in the June 20 filing. The Department, however, should carefully consider whether others at the Company, such as President Steve Bryant, knew on June 20 that the contract was about to be signed and, more importantly, whether it was deceptive of the Company to represent in its June 20 filing that "an agreement with IBM has not been reached" when the signing was so clearly about to happen, if not that very day then certainly within a few days.

employees in the Bay State billing department (and, likely, other departments), via teleconference or other means, explaining that it is moving ahead with outsourcing, and the Company has given formal written notice to Local 273 of its desire to begin negotiations with Local 273 as early as July 18 to discuss the outsourcing of "billing exception" and "payment processing" functions, as well as to discuss related job reductions.[2]

Thus, despite the Company's representations to the contrary, the contract with IBM has been signed; job reductions are imminent; and the possibility that service quality will be adversely affected before the Department has the opportunity to fully adjudicate these issues is quite real.

B. Local 273 Is Not Seeking Any Adjudication Of Its C.B.A.

The Company argues that "Local 273 invites the Department to entangle itself in an inchoate labor dispute between the Union and Bay State" (Opposition, at 6). But the Department will search Local 273's motion in vain for any argument that the Department should grant the requested relief based on any language in the Local 273 collective bargaining agreement ("C.B.A.") or in labor law. Local 273 does not deny that some of its members have various procedural or substantive protections under the C.B.A. However, Local 273 is fully aware of the case law regarding the limitations on state courts or agencies interpreting the National Labor Relations Act. As its Motion makes clear, Local 273 bases its Motion specifically on G. L. ch. 164, § 1E, a law which the Department is not only permitted but <u>required</u> to implement, and on the Department's ratemaking and supervisory powers under sections 76 and 94 of Chapter 164. The Department should not be distracted by the red herring of "labor law" that the Company has

[2] Per June 21, 2005 letter of Jovette Pino, NiSource Director of Human Resources and Labor Relations, to Local 273 President Kevin Friary (Attachment 2).

dragged across the case. As the Affidavit of Kevin Friary in support of Local 273's Motion highlights, many of the employees who are most at risk are not even members of Local 273. Some are not members of any union whatsoever.[3] These facts reinforce the point that Local 273's Motion is in no way premised on the National Labor Relations Act and therefore does not require the Department to interpret labor law or the Local 273 C.B.A.[4]

C. G. L. ch 164, § 1E Is Not Voided By The Mere Existence Of A C.B.A.

Bay State argues that "the staffing level reduction proscription [of G. L. ch. 164, § 1E] does not apply when the potentially affected workers are covered by a collective bargaining agreement." (Opposition, p. 4). This argument is logically absurd because, on the one hand, utilities have generally sought to limit the proscription of § 1E to employees covered by a C.B.A. but, on the other hand, Bay State now argues that anyone covered by a C.B.A. cannot be protected under § 1E. The Company's reading of § 1E would render it meaningless.

To the extent utility companies have acknowledged that § 1E applies to them at all, they have generally maintained that it applies primarily to employees covered by a C.B.A.[5] The

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[3] Friary Affidavit, ¶ 6 ("The Massachusetts-based employees whose jobs are most likely to be outsourced include those who perform billing functions and those involved in answering phones and providing customers service. While Local 273 represents some of these employees, others are represented by another union."). There are apparently several temporary call center employees (see Affidavit of Jody Ajar, filed June 17, 2005 by the United Steelworkers of America), and Local 273 believes that they are not represented by <u>any</u> union. As to these employees, the company's argument is particularly specious.

[4] It is worth repeating that Local 273 is not suggesting that its members have no protections against layoffs under the C.B.A., but only that Local 273 is not relying on those rights to support its Motion.

[5] *See, e.g.*, Initial Comments of Boston Edison Company et al. in DTE 04-116 (Mar. 1, 2005), at 21 (summarizing Department's requirements as setting staffing levels "primarily by [reference to] collective bargaining agreements, and on a case-by-case basis").

Utility Workers Union of America ("UWUA") has been the only party consistently maintaining that the legislature intended § 1E to apply to all employees, union or non-union, since staff reductions in any area can potentially have an adverse affect on service quality.[6] The Department itself, in its initial order in DTE 99-84, took the position that staffing level benchmarks "will be established on a company-specific basis and will be determined by the then-effective collective bargaining-agreement for each Company,"[7] and only modified this language to a limited degree in response to a request for clarification from UWUA.[8] However, it should be obvious that the legislature intended § 1E both to guard against reductions in staffing levels that impair service quality, regardless of whether the relevant staffing positions are covered by a C.B.A., and to prohibit reductions that are in direct violation of a C.B.A. unless there is a showing that such reductions do not impair service quality.

The Company is correct to point out that § 1E restricts a company's ability to reduce staffing levels below those that prevailed on November 1, 1997 "unless such are part of a collective bargaining agreement." Local 273 appends to this Reply sample language from the C.B.A. between Massachusetts Electric Company ("MECo") and UWUA Locals 446 and 454 (Attachment 3) that meets the requirements of the just-quoted clause from § 1E. Article XVIII, § 1of this C.B.A. states: "The Union agrees that for the term of this agreement, all requirements of the Electricity Restructuring Act of 1997, including Section 1E relating to staffing levels have

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[6] *See, e.g.*, DTE 99-84-B (Sept. 28, 2001), at 12 ("UWUA contends that not all employees whose positions affect SQ are covered by collective bargaining agreements [and that] it is a *non sequitur* to determine staffing levels based on collective bargaining agreements").

[7] DTE 99-84 (June 29, 2001), Attachment 1 ("Service Quality Guidelines"), § IV ("Staffing Level Benchmark").

[8] DTE 99-84-B (Sept. 28, 2001), at 11-13.

been satisfied and that this agreement is a collective bargaining agreement under that language."[9] This is precisely the type of C.B.A. language contemplated by the provision of § 1E regarding collective bargaining agreements. But Bay State has no similar agreement with Local 273, no language that specifically agrees that a company's staffing levels are in compliance with § 1E. Rather, the Local 273 C.B.A. contains language, quoted by the Company, that has been carried over from predecessor C.B.A.s dating back decades and that specifies certain limitations against layoffs and the Company's general right to hire and fire. The proposed outsourcing to IBM and consequent loss of jobs is not "part of a collective bargaining agreement."

The Department should also pay heed to the fact that many (possibly most) of the employees whose jobs will be outsourced or eliminated are not members of Local 273 and may not be members of any union.[10] The Company's arguments regarding the C.B.A. with Local 273 are therefore irrelevant as to these employees and bear little on the relevant question of whether the imminent staffing cuts will adversely affect service quality.[11]

D. Miscellaneous Legal Issues

1. The Company inappropriately relies on the February 28, 2003 Interlocutory Order in DTE 02-46 for the proposition that the Department does not have the authority to grant the

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[9] Attachment 3 is drawn from the C.B.A. between MECo and Locals 446 and 454 covering the period May 12, 1999 to May 11, 2003, the first MECo/446-454 C.B.A. subsequent to passage of the Restructuring Act in November 1997. The subsequent C.B.A. between MECo/National GRID and Local 654, the successor to Locals 446 and 454, contains identical language.

[10] See Affidavit of Kevin Friary, n. 3, *supra.*

[11] As noted in Local 273's Motion, prior staffing level reductions have resulted in serious degradations of telephone response at the Springfield call center (Motion, at 2-3). The pending staff reductions will affect "Customer Contact Centers" (Attachment 1, Skaggs letter).

requested relief. The Department emphasized in that case that its "jurisdiction over this dispute arises solely out of the Special Act [St. 1946, c. 86, § 1]." The Special Act gave the towns of Ashland and Framingham the right to "apply to the [Department] for a determination" of the "proper and just sum which shall be paid by the town of Ashland to the town of Framingham" if the towns themselves cannot "agree" on the sum to be paid "for Ashland's use of Framingham's sewerage facilities." Interlocutory Order, at 1-2. Since the Special Act in no way amended or even cited any of the Department's powers or authority under G. L. ch. 164, §§ 1E, 76 & 94, the gloss that the Interlocutory Order places on the Special Act has no bearing on any issue raised by Local 273's Motion or on its legal arguments regarding the Department's authority under §§ 1E, 76 and 94.

2. The Company's suggestion that DTE 04-116 and DTE 05-12 are the appropriate forums for resolving the issues raised by Local 273's Motion is disingenuous at best. First, neither of these dockets is an adjudicatory docket in which Local 273 has been granted intervenor status. The Department has denied Local 273 the right to file discovery in these dockets, and Local 273 would therefore have questionable standing to file a motion for protective orders. As recently as the June 14, 2004 procedural conference in DTE 04-116, which is a generic proceeding involving all regulated gas and electric companies, the Hearing Officer reiterated that Local 273 and the other UWUA locals will not be allowed to file discovery requests nor will they be allowed to explore any company-specific issues, such as individual company compliance with staffing levels.[12] Second, the Company is well aware that in DTE 05-12 Local 273 has sought "the right to file reasonable discovery of Bay State's 2004 SQ Report of staffing levels" and

[12] Bay State was represented by counsel at that hearing, and the Company is presumably well aware of the scope of the proceeding.

asked the Department "to promptly open an investigation to set benchmark staffing levels for Bay State,"[13] but that the Department has yet to take any action on either request. By suggesting that either DTE 05-12 or 04-116 are appropriate forums for resolving Local 273's concerns, Bay State is engaging in a shell game, always arguing that § 1E simply does not apply to it[14] or arguing that any proceeding but the present proceeding is the proper forum for addressing staffing levels and the requirements of § 1E.

V. CONCLUSION

Local 273 again asks the Department to issue an order prohibiting Bay State from reducing its staffing levels in Massachusetts until a final order is issued in this case. Local 273 reiterates its request for oral argument on its motion.

Respectfully Submitted,

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[13] Comments of Local 273 in DTE 05-12 (Apr. 20, 2005), at 2-3.

[14] See "Bay State Motion for Clarification" in DTE 99-84 (Oct. 22, 2001).